Supreme Court, U.S.
FILED
JAN 7 - 2015
OFFICE OF THE CLERK

No. 14-144

# In the Supreme Court of the United States

JOHN WALKER, III, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE BOARD, *et al.*,
*Petitioners*,

v.

TEXAS DIVISION, SONS OF CONFEDERATE VETERANS, INC., *et al.*,
*Respondents*.

*On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit*

## BRIEF OF JUSTICE AND FREEDOM FUND AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Deborah J. Dewart
620 E. Sabiston Drive
Swansboro, NC 28584-9674
(910) 326-4554
debcpalaw@earthlink.net

James L. Hirsen
*Counsel of Record*
505 S. Villa Real Drive
Suite 208
Anaheim Hills, CA 92807
(714) 283-8880
james@jameshirsen.com

*Counsel for Amicus Curiae*

Becker Gallagher Cincinnati, OH Washington, D.C. · 800.890.5001

## TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... iii

INTEREST OF *AMICUS CURIAE* ..... 1

INTRODUCTION AND SUMMARY OF THE ARGUMENT ..... 1

ARGUMENT ..... 3

I. THIS COURT SHOULD CRAFT A TEST THAT PROTECTS FREE EXPRESSION WITHOUT CRIPPLING THE ABILITY OF GOVERNMENT TO FUNCTION AND IMPLEMENT PUBLIC POLICIES. ..... 3

A. The Government May Adopt Policies And "Speak." ..... 3

B. The First Amendment Is Prohibitory —Not Mandatory. ..... 4

C. The Nature Of The License Plate Program Warrants Judicial Restraint In Mandating An Open Forum. ..... 6

D. *Wooley* Does Not Alter The Result. ..... 7

II. TESTS EMPLOYED BY COURTS IN PRIOR CASES SUPPORT THE STATE'S POSITION—BUT ARE GENERALLY CONFUSING AND UNWORKABLE. ..... 8

A. Vehicle Identification—Not Expression —Is The Primary Purpose For License Plates. ..... 10

B. The State Maintains Editorial Control. . 11

C. The "Literal Speaker" Factor And Related "Reasonable Observer" Test Weigh In Favor Of Texas. The State Manufactures License Plates, Approves Their Content, And Retains Ownership. 13

D. The State Bears Ultimate Responsibility For Regulation Of License Plates. 16

III. FIRST AMENDMENT IMPLICATIONS VARY UNDER DIFFERENT STATUTORY SCHEMES. 18

A. Plates Expressly Authorized By Statute Are Most Likely To Be Government Speech. 18

B. Plates Issued In Response To Applications May Open A Forum—Or Not—Depending On How The Process Is Structured. 20

C. Individual Personalized Vanity Plates Are Most Likely To Open A Forum For Private Expression. 21

CONCLUSION 22

## TABLE OF AUTHORITIES

### CASES

*ACLU of N.C. v. Tata*,
742 F.3d 563 (4th Cir. 2014) 9, 11, 12, 15, 19

*ACLU v. Bredesen*,
441 F.3d 370 (6th Cir. 2006) 4, 7, 9, 12, 19

*Arizona Life Coalition v. Stanton*,
515 F.3d 956 (9th Cir. 2008) *passim*

*Ark. Educ. Television Comm'n v. Forbes*,
523 U.S. 666 (1998) 6, 13

*Bd. of Regents of Univ. of Wis. System v. Southworth*,
529 U.S. 217 (2000) 3, 4

*Chiras v. Miller*,
432 F.3d 606 (5th Cir. 2005) 14

*Choose Life of Ill., Inc., v. White*,
547 F.3d 853 (7th Cir. 2008) 9, 10, 16, 20

*Downs v. Los Angeles Unified School District*,
228 F.3d 1003 (9th Cir. 2000) 6

*Harris v. McRae*,
448 U.S. 297 (1980) 4

*International Soc'y for Krishna Consciousness, Inc. v. Lee*,
505 U.S. 672 (1992) 6

*Johanns v. Livestock Marketing Ass'n*,
544 U.S. 550 (2005) 7, 9, 11, 12, 19

*Knights of the Ku Klux Klan v. Curators of the Univ. of Mo.*,
203 F.3d 1085 (8th Cir. 2000) 6, 8, 10

*Lewis v. Wilson*,
253 F.3d 1077 (8th Cir. 2001) 11, 22

*Maher v. Roe*,
432 U.S. 464 (1977) 4

*Nat'l Endowment for the Arts v. Finley*,
524 U.S. 569 (1998) 3, 7, 13

*Page v. Lexington County School District One*,
531 F.3d 275 (4th Cir. 2008) 9

*Perry v. McDonald*,
280 F.3d 159 (2d Cir. 2001) 5, 11, 22

*Perry Educ. Ass'n v. Perry Local Educ. Ass'n*,
460 U.S. 37 (1983) 22

*Planned Parenthood of S.C., Inc. v. Rose*,
361 F.3d 786 (4th Cir. 2004) *passim*

*Pleasant Grove City v. Summum*,
555 U.S. 460 (2009) *passim*

*Roach v. Stouffer*,
560 F.3d 860 (8th Cir. 2009) . . *passim*

*Rust v. Sullivan*,
500 U.S. 173 (1991) 4, 14

*Sons of Confederate Veterans, Inc. v. Comm'r of Va. Dep't of Motor Vehicles*,
288 F.3d 610 (4th Cir. 2002) *passim*

*Sons of Confederate Veterans, Inc. v. Comm'r of Va. Dep't of Motor Vehicles*,
305 F.3d 241 (4th Cir. 2002) 2, 5, 13, 16

*Tex. Div., Sons of Confederate Veterans v. Vandergriff*,
2013 U.S. Dist. LEXIS 52785 (W.D. Tex. 2013) 6

*Tex. Div., Sons of Confederate Veterans v. Vandergriff*,
759 F.3d 388 (5th Cir. 2014) *passim*

*Turner v. City Council of City of Fredericksburg, Va.*,
534 F.3d 352 (4th Cir. 2008) 8

*United States v. Am. Library Ass'n, Inc.*,
539 U.S. 194 (2003) 6, 13

*Wells v. City & County of Denver*,
257 F.3d 1132 (10th Cir. 2001) 6, 8, 14

*Wooley v. Maynard*,
430 U.S. 705 (1977) 7, 8

**STATUTES**

Tex. Transp. Code Ann. § 504.801(c) 21

**OTHER AUTHORITIES**

R. Bezanson & W. Buss, *The Many Faces of Government Speech*, 86 Iowa L. Rev. 1377 (2001) 3

43 Tex. Admin. Code §§ 217.28(i)(7), .40 21

## INTEREST OF *AMICUS CURIAE*[1]

Justice and Freedom Fund, as *amicus curiae*, respectfully submits that the decision of the Fifth Circuit Court of Appeals should be reversed.

Justice and Freedom Fund is a California non-profit, tax-exempt corporation formed on September 24, 1998 to preserve and defend the constitutional liberties guaranteed to American citizens, through education, legal advocacy, and other means. JFF's founder is James L. Hirsen, professor of law at Trinity Law School and Biola University in Southern California and author of New York Times bestseller, *Tales from the Left Coast*, and *Hollywood Nation*. Mr. Hirsen is a frequent media commentator who has taught law school courses on constitutional law. JFF has made numerous appearances in this Court as *amicus curiae* in cases involving the First Amendment, including *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009). Co-counsel Deborah Dewart is the author of a book, *Death of a Christian Nation*.

## INTRODUCTION AND SUMMARY OF THE ARGUMENT

The power and machinery of government should never be used to stifle private expression or distort debate in the "marketplace of ideas." The government speech doctrine is a developing concept that should be

---

[1] The parties have consented to the filing of this brief. *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

thoughtfully restrained so that it never squelches the First Amendment rights of private citizens. At the same time, the government must "speak," allocate scarce resources, and develop public policies in order to serve the people it governs. That cannot happen without necessarily promoting some viewpoints and discouraging others.

License plates are perhaps "the quintessential example of speech that is both private and governmental." *Sons of Confederate Veterans, Inc. v. Comm'r of Va. Dep't of Motor Vehicles*, 305 F.3d 241, 245 (4th Cir. 2002) ("*SCV II*") (Luttig, J., concurring). This case is thus an excellent vehicle for this Court to reexamine and clarify the emerging government speech doctrine. In this context, where government and private speech intersect, courts have wrestled with the character of the speech. Most courts have employed a four-factor test, borrowed the "reasonable observer" inquiry from Establishment Clause jurisprudence, or combined the two analytical approaches, in order to classify the speech. Results are widely divergent, confusing, and even contradictory. The tests have proved unworkable and highly subjective.

Different statutory schemes yield different conclusions as to whether the license plates are government or private speech. It is possible—and entirely constitutional—for a state to adopt a scheme where the government remains the primary speaker. And it is equally possible to open a limited forum for private organizations or citizens to express themselves. Clarity is needed so that states may craft appropriate programs with knowledge of the constitutional consequences.

## ARGUMENT

### I. THIS COURT SHOULD CRAFT A TEST THAT PROTECTS FREE EXPRESSION WITHOUT CRIPPLING THE ABILITY OF GOVERNMENT TO FUNCTION AND IMPLEMENT PUBLIC POLICIES.

America is a nation governed by consent of the people. The people elect officials to set and implement public policy. Some overlap between the government's speech and private speech is inevitable, raising constitutional concerns and "present[ing] heightened risks that the government may displace or monopolize private speech by inserting its voice in the speech marketplace." R. Bezanson & W. Buss, *The Many Faces of Government Speech*, 86 Iowa L. Rev. 1377, 1381 (2001). A workable test should be crafted that will properly respect and apply the First Amendment. That test should avoid suppression of protected private speech, including the voices of those who disagree with current government policies. But it must also avoid drowning the voice of "the people," as expressed through their duly elected representatives.

#### A. The Government May Adopt Policies And "Speak."

This Court's precedents confirm that the government may adopt policies, endorse certain views, and "speak" for itself. *Pleasant Grove City v. Summum*, 555 U.S. 460, 467-468 (2009) ("*Summum*"); *Bd. of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 229 (2000) ("*Southworth*"); *Nat'l Endowment for Arts* v. *Finley*, 524 U.S. 569, 598 (1998) (Scalia, J., concurring in judgment) ("It is the very

business of government to favor and disfavor points of view"). The government could hardly function without this freedom. *Summum*, 555 U.S. at 468. The government's ability to speak is not only a necessity, but is rooted in its political accountability to the electorate. *Southworth*, 529 U.S. at 235.

The government may also selectively fund activities it believes to be in the public interest, even though alternative goals are necessarily discouraged. *Maher v. Roe*, 432 U.S. 464, 474 (1977) (government may allocate funds to favor childbirth and discourage abortion); *Harris v. McRae*, 448 U.S. 297 (1980) (same); *Rust v. Sullivan*, 500 U.S. 173, 192-193 (1991) (same). A state may use specialty license plates to raise revenue for restricted purposes. *See, e.g., ACLU v. Bredesen*, 441 F.3d 370, 372 (6th Cir. 2006) ("*Bredesen*") ("The Act strictly regulates the precise activities that these profits shall fund.")

### B. The First Amendment Is Prohibitory —Not Mandatory.

The Free Speech Clause demands that the government not abridge freedom of speech. It does not require that government associate itself with *every* private message in *every* conceivable context. A mandate that every specialty license plate program encompass all viewpoints—regardless of its legal parameters—would discourage these programs and encourage states to return to a system of randomly assigned plates. The end result is less speech, not more.

If the state is considered the primary speaker, some viewpoints will not be represented. But those speakers

have a myriad of other ways to speak. Pet. Br. 11-12; *Tex. Div., Sons of Confederate Veterans v. Vandergriff*, 759 F.3d 388, 407 (5th Cir. 2014) (Smith, J., dissenting) ("*Vandergriff*") ("license plate frames, bumper stickers, window stickers, window flags, or even painting cars with the Confederate flag"); *Perry v. McDonald*, 280 F.3d 159, 169-170 (2d Cir. 2001) (bumper stickers); *SCV II*, 305 F.3d at 250 (Niemeyer, J., dissenting) ("Those who wish to display the Confederate Flag logo, even on their motor vehicles, remain free to do so.") The *only* place where SCV cannot display its message is "on the state-owned, state-issued license plate." *Id.* at 252 (Gregory, J., dissenting). In *Summum*, the City's rejection of Summum's monument did not "disproportionately restrict [its] freedom of expression" because the group could still engage in traditional modes of speech in the park. *Summum*, 555 U.S. at 494 (Breyer, J., concurring). Even more than public parks, license plates "do not serve speech-related interests alone." *Id.*

The state manufactures license plates, retains ownership, and places its name on them. The private speakers' agreement with the message does not trump the state's role:

> The fact that the licensee also speaks by choosing to display a customized but authorized version of the license plate does not change the fact that the license plate itself was the issue of the State and therefore constitutes government speech.

*SCV II*, 305 F.3d at 251 (Niemeyer, J., dissenting).

### C. The Nature Of The License Plate Program Warrants Judicial Restraint In Mandating An Open Forum.

License plates are not a place where people gather to exchange ideas. The scope of possible speech is very limited. *Tex. Div., Sons of Confederate Veterans v. Vandergriff*, 2013 U.S. Dist. LEXIS 52785, *47 (W.D. Tex. 2013). The plates are small pieces of government-owned property designed to identify vehicles, often through random letter-number combinations.

In recent years, innovative programs have introduced a limited means of expression—sometimes to communicate state policies, sometimes a combination of voices, and other times the vehicle owner's expression alone. But "the public forum doctrine should not be extended in a mechanical way to the very different context of [license plates]." *Knights of the Ku Klux Klan v. Curators of the Univ. of Mo.*, 203 F.3d 1085, 1093 (8th Cir. 2000) ("*Knights*"), quoting *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 672 (1998) (public broadcasting). *See also International Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 682 (1992) (goal of public airport terminal is "facilitation passenger air travel," not "the promotion of expression"); *Wells v. City & County of Denver*, 257 F.3d 1132, 1143 (10th Cir. 2001) ("*Wells*") (City presenting holiday message is not constitutionally obligated to incorporate "the message of any private party with something to say"); *Downs v. Los Angeles Unified School District*, 228 F.3d 1003, 1013 (9th Cir. 2000) (same—public school bulletin board); *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 206 (2003) (internet terminals and book collections at

public library); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569 (government acted as patron rather than sovereign in awarding grants to support the arts). Not every context for government speech automatically morphs into a public forum.

### D. *Wooley* Does Not Alter The Result.

The Fifth Circuit erroneously concluded that this Court presumed "the license plates were private speech" in *Wooley v. Maynard*, 430 U.S. 705 (1977) ("*Wooley*"). *Vandergriff*, 759 F.3d at 395. On the contrary, *Wooley* addresses the "First Amendment right to avoid becoming the courier" for "the *State's* ideological message" by using one's personal vehicle as a "mobile billboard." *Wooley*, 430 U.S. at 715, 717 (emphasis added). The First Amendment guards the right "to decline to foster" "religious, political, and ideological causes." *Id.* at 714; *see also Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550, 557 (2005). This freedom of thought applies whether the speech originates with the government or a private source.

The Sixth and Ninth Circuits correctly parse important aspects of *Wooley*. *Bredesen* distinguished it from schemes that offer choices among state-approved plates:

> The evil in *Wooley* was that the automobile owners were compelled to disseminate the message; here automobile owners are not only not compelled, they have to pay extra to disseminate the message.

*Bredesen*, 441 F.3d at 378. *Arizona Life Coalition* observes that the "private property" at issue in *Wooley* was the automobile rather than the state-owned plate

bearing the *state's* message. *Arizona Life Coalition v. Stanton*, 515 F.3d 956, 967 n. 6 (9th Cir. 2008) ("*Stanton*") ("We have no doubt that New Hampshire's motto, 'Live Free or Die,' constitutes government speech.").

The program approved by Texas (and other states) avoids the compelled speech challenge in *Wooley*, where only one message was available. Vehicle owners may select from among a variety of state-approved messages. The compelled speech doctrine is not at issue.

## II. TESTS EMPLOYED BY COURTS IN PRIOR CASES SUPPORT THE STATE'S POSITION—BUT ARE GENERALLY CONFUSING AND UNWORKABLE.

Several circuit courts have utilized a four-factor test to analyze cases that implicate both public and private speech, in license plate cases and other contexts: *Knights*, 203 F.3d at 1093-1094 (sponsorship identifications on radio broadcasts); *Sons of Confederate Veterans, Inc. v. Comm'r of Va. Dep't of Motor Vehicles*, 288 F.3d 610, 618 (4th Cir. 2002) ("*SCV I*") (license plates); *Planned Parenthood of S.C., Inc. v. Rose*, 361 F.3d 786, 793 (4th Cir. 2004) ("*Rose*") (license plates); *Turner v. City Council of City of Fredericksburg, Va.*, 534 F.3d 352, 354 (4th Cir. 2008) (legislative invocations); *Roach v. Stouffer*, 560 F.3d 860, 867-868 (8th Cir. 2009) ("*Roach*") (license plates); *Stanton*, 515 F.3d at 965 (9th Cir. 2008) (license plates); *Wells*, 257 F.3d at 1139 (city-sponsored holiday display).

This Court has not considered the four-factor test, and there is a question about its viability following *Johanns*, which emphasized the government's broad control over the message rather than weighing (or counting) factors. The Sixth Circuit found the test in tension with *Johanns*. *Bredesen*, 441 F.3d at 380 ("*Johanns* sets forth an authoritative test for determining when speech may be attributed to the government for First Amendment purposes.") The Fourth Circuit reasoned that *Johanns* merely "distilled" the four factors by focusing on "the government's *establishment* of the message" and its "*effective control* over the content and dissemination of the message." *Page v. Lexington County School District One*, 531 F.3d 275, 281 (4th Cir. 2008), citing *Johanns*, 544 U.S. at 560-562. Similarly, the Ninth Circuit concluded that "the [*Johanns*] Court relied on factors similar to those set forth in the four-factor test." *Stanton*, 515 F.3d at 965. The Fourth Circuit recently reaffirmed the test, although describing the factors as "instructive but neither exhaustive nor always uniformly applicable." *ACLU of N.C. v. Tata*, 742 F.3d 563, 569 (4th Cir. 2014) ("*Tata*").

The Seventh Circuit travels yet another avenue, concluding that "[the] multi-factor test can be distilled (and simplified) by focusing on the following inquiry: Under all the circumstances, would a reasonable person consider the speaker to be the government or a private party?" *Choose Life of Ill., Inc., v. White*, 547 F.3d 853, 865 (7th Cir. 2008) ("*CLI*"). To answer that question, the Court proposed three inquiries reminiscent of the four-factor test: "the degree to which the message originates with the government, the degree to which the government exercises editorial

control over the message, and whether the government or a private party communicates the message." *Id.*

Numerous courts have analyzed license plate schemes using the four-factor test and/or the "reasonable observer" inquiry. They have reached a wide array of conclusions—sometimes on similar facts and other times because of relevant distinctions.

### A. Vehicle Identification—Not Expression—Is The Primary Purpose For License Plates.

The four-factor test originated with *Knights*, 203 F.3d 1085, a case involving federally-mandated sponsorship identifications. The "central purpose" of that program was "not to promote the views of the donors" but rather to acknowledge their contributions to the station. *Id.* at 1093.

License plate programs serve a wide range of purposes. Some cases identify government interests:

- *Rose*, 361 F.3d at 793 ("the Act's purpose is to promote the State's preference for the pro-life position")
- *CLI*, 547 F.3d at 865 ("primary purpose is to identify the vehicle, not to facilitate the free exchange of ideas")

Other cases list raising revenue and/or expression:

- *SCV I*, 288 F.3d at 619 ("produce revenue while allowing...for the private expression of various views")
- *Stanton*, 515 F.3d at 966 (raise revenue)

- *Roach v. Stouffer*, 560 F.3d at 867 ("to allow private organizations to promote their messages and raise money and to allow private individuals to support [them]")
- *Tata*, 742 F.3d at 572 ("to allow North Carolina drivers to express their affinity for various special interests, as well as to raise revenue for the state")

In *Johanns*, the program at issue implemented a "federal policy of promoting the marketing and consumption of beef and beef products, using funds raised by an assessment." *Johanns*, 544 U.S. at 553.

Free expression is more likely the purpose of a personalized "vanity" license plate scheme where an individual selects a unique combination of letters and numbers. *Lewis v. Wilson*, 253 F.3d 1077, 1079 (8th Cir. 2001) ("to give vent to the personality, and reveal the character or views of the plate's holder"). But even here, it is not a foregone conclusion: "Automobile license plates are governmental property intended primarily to serve a governmental purpose, and inevitably they will be associated with the state that issues them." *Perry v. McDonald*, 280 F.3d at 169 (vanity program could exclude scatological terms).

**B. The State Maintains Editorial Control.**

This Court highlighted government control in *Johanns* and *Summum*. In *Summum*, the City exercised "final approval authority" in selecting monuments for display in the park, using set criteria. *Summum*, 555 U.S. at 473. In *Johanns*, the government established the message and exercised final approval over every word. *Johanns*, 544 U.S. at

560-562. The government speech doctrine applied even though private sources assisted in developing specific messages. *Id.* This principle has been applied to license plates. *Roach v. Stouffer*, 560 F.3d at 864-867 ("both the state and the sponsoring organization exercise some degree of editorial control"); *Bredesen*, 441 F.3d at 378 (volunteers choose to display state-approved messages on license plates).

Government control over license plates is ordinarily evident from the relevant statute(s). This factor often weighs in favor of the state:

- *Rose*, 361 F.3d at 793 (state retained complete editorial control—this factor weighed in its favor)
- *Bredesen*, 441 F.3d at 375 ("government determines an overarching message and retains power to approve every word disseminated")
- *Tata*, 742 F.3d at 573 ("editorial control...weighs in favor of the government")

The Fourth Circuit (*Rose* and *Tata*) nevertheless ruled against the state, while the Sixth Circuit (*Bredesen*) found the plates were government speech.

The Fourth Circuit minimized the importance of state control in an earlier case. *SCV I*, 288 F.3d 610, 621 ("little, if any, [government] control ordinarily is exercised"). The Fifth Circuit, similarly, insisted this Court "did not espouse a myopic control test in *Johanns*." *Vandergriff*, 759 F.3d at 394, citing *Tata*, 742 F.3d at 570.

In another SCV license plate case, Judge Niemeyer explained that "[t]he State has manifested its complete control over license plates, even dictating modifications, alterations, and special language or numbers that it will accept." *SCV II*, 305 F.3d at 249-250 (Niemeyer, J., dissenting). Similarly, Judge Smith described the state's ultimate control in the Texas scheme:

> Texas invites private groups or persons to submit license-plate designs for consideration, but the state ultimately chooses what designs it wishes to adopt and which plates it wishes to manufacture for sale.

*Vandergriff*, 759 F.3d at 405 (Smith, J., dissenting).

In other contexts, the government exercises an editorial function without incurring a constitutional obligation to open a public forum: *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666 (public television broadcaster had discretion to exclude independent congressional candidate from televised debate); *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194 (library exercises discretion in selecting books); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569 (government acted as patron and exercised discretion in awarding grants to support the arts).

### C. The "Literal Speaker" Factor And Related "Reasonable Observer" Test Weigh In Favor Of Texas. The State Manufactures License Plates, Approves Their Content, And Retains Ownership.

It is impossible to deny the state's essential role in issuing and regulating vehicle license plates. Prior to

the advent of specialty plate programs, no one would have attributed the content of the plates to private speakers. But as states have established and expanded specialty programs, blending limited private expression with a quintessentially government function, questions have baffled courts.

The "literal speaker"—third of the four factors—is closely related to the "reasonable observer" test the Fifth Circuit adopted. Some courts even condense the four factors into a reasonable observer inquiry. *Roach v. Stouffer*, 560 F.3d at 867 ("Our analysis boils down to one key question: whether, under all the circumstances, a reasonable and fully informed observer would consider the speaker to be the government or a private party.") That "one key question" has generated mixed results. Judge Smith, dissenting from the majority in this case, observed how a reasonable observer in prior cases might associate the message with a private speaker as well as the government—the Fraternal Order of the Eagles that donated the Ten Commandments monument in *Summum*; the physicians in *Rust*; the authors of school textbooks in *Chiras v. Miller*, 432 F.3d 606 (5th Cir. 2005) (public school curriculum is government speech). *Vandergriff*, 759 F.3d at 403, 409 (Smith, J., dissenting).

Property ownership is relevant. "*Wells* reasoned that ownership of the means of communication was a valid consideration." *SCV I*, 288 F.3d at 621; *see Wells*, 257 F.3d at 1139 (city owned and maintained the holiday display). But it is hardly conclusive here. Vehicles are privately owned, while the state continues

to own the plates—and the two pieces of property are physically joined. It is no wonder there is confusion.

Some courts, including the Fifth Circuit, highlight the vehicle owner:

- *Vandergriff*, 759 F.3d at 393 ("Texas SCV argues that any reasonable observer would view a specialty license plate as the speech of the individual driving the car")
- *Tata*, 742 F.3d at 574 ("to any reasonable observer, the literal speaker of a message on a specialty plate that the observer knows the vehicle owner selected is surely the vehicle owner ")
- *Rose*, 361 F.3d at 794 (reasoning by analogy—"just as the literal speaker of a bumper sticker message is the vehicle owner, not the producer of the bumper sticker")
- *Roach v. Stouffer*, 560 F.3d at 867 ("a reasonable and fully informed observer would consider the speaker to be the organization that sponsors and the vehicle owner who displays the specialty license plate ")

Other courts point to the state's ownership of the plate:

- *Stanton*, 515 F.3d at 966-967 ("the fact that Arizona owns the special organization plates supports a finding that the State is the literal speaker")
- *SCV I*, 288 F.3d at 621 ("Virginia continues to own the special plates at all times")

- *CLI*, 547 F.3d at 866 (license plates are "reasonably viewed as having the State's stamp of approval...owned and issued by the State")

Judge Smith's dissent highlights the flaws in bypassing the state's role and attributing the plate content solely to the vehicle owner:

> [L]icense plates broadcast an associational image of the state on Texas vehicles wherever they may travel...there are no license plates that do not bear the name of the state of registration, directly imputing the state's goodwill and reputation on whatever communication the plate bears.

*Vandergriff*, 759 F.3d at 406 (Smith, J., dissenting).

The "reasonable observer" will no doubt understand *both* the state's essential role in issuing and approving license plates, *and* the vehicle owner's decision to select a particular specialty plate. And in light of the technical differences among specialty plate programs—differences the typical observer may neither know nor understand—this is a wobbly test indeed. Even circuit courts cannot agree.

### D. The State Bears Ultimate Responsibility For Regulation Of License Plates.

Courts often collapse "literal speaker" and "ultimate responsibility" and brush over this final factor. *See, e.g., Rose*, 361 F.3d at 794; *Roach v. Stouffer*, 560 F.3d 860, 867-868 (8th Cir. 2009); *SCV II*, 305 F.3d at 251 (Gregory, J., dissenting) ("The panel gave *very* short shrift to this factor—the factor I think may very well be a key to the case.") *Rose* and *Roach* both credited

private speakers with ultimate responsibility. The Fourth Circuit struggled but could not reach a clear conclusion:

> The "literal" speaker" here might be said to be the license plate itself, which would seem not to suggest either government or private speech strongly, and who bears "ultimate responsibility" for the speech is unclear.

*SCV I*, 288 F.3d at 621. In the Ninth Circuit, Arizona retained less control over the message and merely responded to applications from nonprofit organizations. "[T]he statutory requirements address[ed] who may speak, not what they may say." *Stanton*, 515 F.3d at 966. The Arizona License Plate Commission was statutorily obligated to approve the application and issue the plate if certain minimum requirements were met. *Id.* at 961. Under these circumstances, the Court held that Arizona Life Coalition was ultimately responsible for the speech.

In this case, even though the state shares responsibility and editorial discretion with private organizations and persons, "manufacturing specialty license plates...*require[s]* the government's assistance and complicity." *Vandergriff*, 759 F.3d at 407 (Smith, J., dissenting). It is difficult to conclude that private speakers bear "ultimate responsibility" when the state is responsible for passing legislation to authorize the plates, approving and regulating the content, manufacturing, and ownership. Overall, these facts compel the conclusion that Texas bears ultimate responsibility.

## III. FIRST AMENDMENT IMPLICATIONS VARY UNDER DIFFERENT STATUTORY SCHEMES.

Specialty license plates undoubtedly involve an overlap between government and private expression. The state "speaks" by authorizing specific government messages on specialty license plates. A driver then communicates agreement by selecting a particular design. The messages coincide. But courts have wrestled with the First Amendment implications, particularly where a state declines to authorize a specific message. Their focus on the "mixed" nature of the speech, weighing and counting multiple factors, has generated confusion rather than a workable test.

Instead, it may be preferable to consider how different statutory schemes produce different results. First, government speech is most likely present where each specialty plate is authorized by statute with precise wording and restrictions on how the revenue may be used. Second, programs that provide for applications from private organizations *may* or may not open a forum for private speech, depending on the nature and scope of the state's role in the approval process. Third, individual personalized "vanity" plates are most likely to open a forum subject to First Amendment principles.

### A. Plates Expressly Authorized By Statute Are Most Likely To Be Government Speech.

Many of the license plate cases involve express statutory authorization for specific specialty plates. The statute typically identifies the precise wording and

often restricts use of the proceeds. With this level of government control, the analysis should be straightforward: government speech. Instead, several circuits have employed the four-factor test and greatly confused the issue.

The recent North Carolina case in the Fourth Circuit is one where the General Assembly had to pass legislation, "An Act to Authorize the Division of Motor Vehicles to Issue Various Special Registration Plates," in order to approve a "Choose Life" plate. *Tata*, 742 F.3d at 566. The Court nevertheless ruled there was impermissible viewpoint discrimination because the state declined to also pass legislation authorizing a pro-abortion plate. *Id.* A decade earlier, the Fourth Circuit applied the four-factor analysis to South Carolina's similar statutory scheme, found that it led to an "indeterminable result," but nevertheless struck it down on First Amendment grounds. *Rose*, 361 F.3d at 793.

In a Tennessee case, the Sixth Circuit applied this Court's holding in *Johanns* to reach the eminently reasonable conclusion that the plates were government speech:

> *Johanns* stands for the proposition that when the government determines an overarching message and retains power to approve every word disseminated at its behest, the message must be attributed to the government for First Amendment purposes.

*Bredesen*, 441 F.3d at 375. The Tennessee program appears to be the epitome of a government-controlled scheme that qualifies as government speech.

The Seventh Circuit acknowledged the split among other circuits, but declined to acknowledge Illinois' statutory scheme as government speech—even though the statute was amended (while the case was pending) to "require express prior legislative approval" for issuance of new plates. *CLI*, 547 F.3d at 855.

### B. Plates Issued In Response To Applications May Open A Forum—Or Not—Depending On How The Process Is Structured.

Some states provide an application process for private organizations to design and propose a specialty license plate. The state may relinquish significant control to these organizations, within the applicable space limits. Depending on how the program is structured and the degree of control retained by the state, a forum may be established.

The Eighth Circuit considered a Missouri case where the state provided more than one method to initiate a specialty plate. The state legislature could pass a bill creating a plate or a private organization could submit an application proposing one. *Roach v. Stouffer*, 560 F.3d at 862. Under the second method, "both the state and the sponsoring organization exercise some degree of editorial control over the messages on specialty plates." *Id.* at 867. This arrangement is more characteristic of a forum than the strictly state-controlled statutory schemes in other cases. Missouri's process was found constitutionally deficient because it granted officials unbridled discretion to decline an application. *Id.* at 870.

Arizona enacted an application process that contrasts with Missouri's process in constitutionally relevant ways. There, the statute provided that "[t]he [C]ommission *shall* authorize a special organization plate if the organization" met certain minimal general requirements, such as serving the community. *Stanton*, 515 F.3d at 961. The message was crafted by the applicant organization, and the Arizona License Plate Commission was obligated to approve the plate once the basic requirements were met.

In both Missouri and Arizona, the state rolled back its control and opened the program for private expression. In Texas, the state has retained significantly more control over a program allowing private organizations to apply for a plate. When a plate is proposed, the Texas Department of Motor Vehicles Board must approve the plate's design. Tex. Transp. Code Ann. § 504.801(c); 43 Tex. Admin. Code §§ 217.28(i)(7), .40; Pet. Br. 4-5.. Unlike Missouri and Arizona, Texas has not created a forum for private speech.

### C. Individual Personalized Vanity Plates Are Most Likely To Open A Forum For Private Expression.

Many states now offer individual vehicle owners an opportunity to design unique "vanity" plates. There are typically limits on the number of characters, and a new plate may not duplicate an existing plate. It is also common to restrict the use of highly offensive terms (profanity, obscenity).

The Second and Eighth Circuits have both considered vanity plates. The Eight Circuit implied

that vanity plates communicate private speech by comparing them to bumper stickers—even though Missouri technically owns the plates. *Lewis v. Wilson*, 253 F.3d at 1079. The Second Circuit concluded that a similar program in Vermont implicated private speech, and extensively discussed the nature of the forum. The plaintiff, who wanted a plate bearing the letters "SHTHPNS," insisted the plates were a designated public forum, while the state argued for a nonpublic forum. *Perry v. McDonald*, 280 F.3d at 167. The Court agreed with the state. The state imposed numerous restrictions, such as the number of characters on the plate. "Such extensive government regulation of expressive activity does not suggest an intent to designate a public forum." *Id.* at 167-168. The Court found Vermont's scheme analogous to the school's internal mail system in *Perry Educ. Ass'n*, (principal's permission was required for access). *Id.* at 168 n. 6, citing *Perry Educ. Ass'n v. Perry Local Educ. Ass'n*, 460 U.S. 37, 47 (1983).

Even in this context, where individual vanity plates are certainly private speech, the Second Circuit held that the state established only a nonpublic forum—the forum with the lowest level of First Amendment protection and greatest discretion for the state.

## CONCLUSION

This Court should reverse the ruling of the Fifth Circuit Court of Appeals.

Respectfully submitted,

James L. Hirsen
*Counsel of Record*
505 S. Villa Real Drive, Suite 208
Anaheim Hills, CA 92807
(714) 283-8880
james@jameshirsen.com

Deborah J. Dewart
620 E. Sabiston Drive
Swansboro, NC 28584-9674
(910) 326-4554
debcpalaw@earthlink.net

*Counsel for Amicus Curiae*